Def. Doc. 2836
(Oshima)

Exhibit # _____

Excerpt from Pitt Cobbett's Cases on International Law, Vol. I. Peace

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ACTS OF STATE IN INTERNATIONAL LAW

McLEOD'S CASE

/Parl. Papers, 1843, vol. lxi.; Wharton, Digest, vol. i. p. 64 et seq.; Moore, International Arbitrations, iii. 2419./

In January, 1841, a British subject named McLeod was arrested, whilst in the State of New York, on a charge of having been concerned in the murder of one Durfee, a United States citizen. Durfee had been killed in 1838 in the course of an attack which had been made on the "Caroline," under the following circumstances: The "Caroline" was a small passenger steamer carrying the American flag and on the American register; but at the time in question she was in fact in the employment of the Canadian insurgents. The latter, who had armed and organized on American territory, in the neighbourhood of Niagara, were proposing to use the vessel for the purpose of making a descent on British territory. In order to prevent this a British force crossed the river by night, and after a short resistance took possession of the "Caroline," and sent her adrift down the falls of Niagara. It was in the course of this attack that Durfee was killed; and McLeod, who was an officer in the Colonial forces, was one of the assailants.

CONTROVERSY./ On McLeod's arrest, the British Minister at Washington at once demanded his release, claiming that the destruction of the "Caroline" was a public act, done by persons in her Majesty's service, acting in obedience to superior orders; and that the responsibility, if any, rested with her Majesty's Government, and could not, according to the usage of nations, be made a ground of legal proceedings against the individuals concerned, who were bound to obey the authorities appointed by their own Government. The United States Government replied that, as the matter had passed into the hands of the Courts, it was out of its power to release McLeod summarily; and that its action must be confined to using all possible means to secure his liberation at the hands of the Courts, and to seeing that no sentence improperly passed upon him was executed. Great Britain, however, caused it be understood that the condemnation and execution of McLeod would be followed by a declaration of war (k). A writ of habeas corpus was applied for on McLeod's behalf; but the Courts of the State of New York refused to release him; with the result that, after being detained in prison for several months, he was ultimately brought to trial and acquitted. In the course of the correspondence that took place Mr. Webster, the United States Secretary of State, admitted that his Government was not inclined to dispute that it was a principle of public law, sanctioned by the usages of all civilised nations, "that an individual forming part of a public force and acting under the authority of his Government is not to be held answerable as a private trespasser or malefactor"; and he therefore agreed that "after the avowal of the transaction as a public one by the British Government, there could be no further responsibility on the part of the agent." The fact of an acquittal rendered it impossible to challenge the proceedings in the State Court. But, to prevent the occurrence of any like incident in the future, an Act of Congress was passed in 1842, which, in effect, empowered the

Federal Courts to grant a writ of habeas corpus in any case where a person, who was a subject or citizen of a foreign State, and domiciled therein, might be held in custody in respect of acts done or omitted under the alleged authority or protection of any commission or orders issued by any foreign State, the validity and effect of which depended on the law of nations (l). In 1857 a claim for damages for wrongful arrest and detention was made before the Claims Commission appointed under the Convention of 1853, but the claim was rejected by the umpire (m).

It is an admitted rule that the public agents of one State cannot be made amenable to the laws of another State, in respect of acts done under the authority of their own State. This would really seem to be only a branch of the wider doctrine, that the acts of the State itself, done in its sovereign capacity, cannot be called in question before the tribunals of another State; for, if the acts of the State itself are exempt from the jurisdiction of foreign tribunals, it follows that the acts of its agents done under its authority and within their delegated powers, or adopted by it, must also be exempt. And this applies to acts done under the authority both of States proper and de facto Governments (n). The most obvious application of this principle is seen in the universal recognition of the fact that members of the military forces of a State, although subject to the laws of war, cannot be made amenable to the civil laws of another State, in respect of acts done in the legitimate exercise of belligerent powers. In McLeod's Case this was extended by the British Government, and rightly, to acts done, even in time of peace and against the subjects of a nominally friendly Power, under the authority of the State, and for which the State assumed full responsibility. The issue thus became one between the States themselves. In this particular case, Great Britain was able to show that the acts in question had been done under the pressure of self-defence. But even had this not been so, the fact of their having been done under the authority of the State should have sufficed to shield the agent, although reparation might of course have been sought from the State itself. And the same principle applies to acts, not being belligerent acts, done by other public agents in their official capacity, and within their delegated powers.

So, in Hatch v. Baez (7 Hun. 596) it was held by the Courts of New York State that no action could be maintained in that State against a former President of the Dominican Republic for acts done by him in his official capacity.

So, again, in Underhill v. Hernandez (26 U.S. App. 573) it was held that no action could be maintained in the United States against the defendant, who had been one of the leaders in a revolutionary movement in Venezuela and for some time the civil and military chief of the revolutionary Government there, in respect of divers acts of aggression committed by him against the person of the plaintiff, a United States citizen; such acts having been done as acts of State.

So long as the circumstances are not such as to call for an express adoption of the agent's act, the tacit acquiescence of the State will suffice to make the act effectual as an act of State as against foreigners (o). On the other hand, just as a State is at liberty to adopt the act of an agent purporting to have been done on its behalf, so it is also at liberty to disown acts which were not actually done by its orders or within the authority committed to its agents. But, if any injury has accrued to another State or its subjects, by reason of any transgression of authority, then such right of disavowal will be subject to an obligation on the part of the State to repair the injury in so far as possible, and to punish the transgressor. Moreover, by pardoning a wrongdoer in a case of this kind, a State will be deemed to accept responsibility as regards the acts complained of (p). In the case where a treaty or international agreement has been entered into by an agent in excess of his authority, there is also a right of disavowal; but this is equally subject to the obligation of restoring any advantage that may have been gained thereunder (q).

(k) Lord Palmerston, then Secretary of State for Foreign Affairs, told Mr. Stevenson, the U.S. Minister in London, that such would be the case.

(l) See also Hall, 270, 314; and Taylor, p. 171.

(m) Moore, Arbitrations, iii. 2419.

(n) See Underhill v. Hernandez (26 U.S. App. 573); Scott, p. 62, and cases there cited.

(o) The Rolla (6 C. Rob. 364).

(p) See award in the case of Cotesworth and Powell (Moore, Arb. ii. 2050, at 2085).

(q) See Hall, 335; and as to the capitulation of El Arisch, 593. But all treaties, except such as are concluded directly by the treaty-making Power, are now regarded as subject to ratification.

法廷證第　號

ピットニベット著

國際法判例　第一書

平和

七九頁ー八二頁

國際法上の國家の行爲　マクレオド事件

議會書類一八四三年刷、第一書　フワールトン、ダイヂエスト第一書六四頁以下、ムーア國際仲裁第三書二四一九頁

一八四一年一月英國臣民マクレオドといふ者がニューヨーク州に於て合衆國市民ダーファイ殺害事件に關係があつた嫌で逮捕された。ダーフーは一八三八年「カロライン號」滯在中に殺害されたものでその事情は次の如くである。

「カロライン號」はアメリカに船籍を有しアメリカ國旗を掲揚する乘客用小汽船であつたが、この問題の當時は事實上カナダの暴徒の傭船となつて居つた。このカナダの暴徒はアメリカの領土内であるナイアガラ附近に於て武裝し集結したもので、英國領土に下る目的をもつて「カロライン號」を使用しようと言うのであつた。英國側は之を妨げる爲に夜に

じて渡河、多少の抵抗を受けたが遂に「カロライン號」を奪取し之をナイアガラの瀑布に向けて漂流せしめた。ダーフィーが殺害されたのは襲撃中のことであつた。マクレオドはこの植民地軍の將校でこの襲撃に參加したのであつた。

「聆駁」マクレオド逮捕に對して、ワシントンの帝國公使は直ちにこの釋放を要求したが、この主張する所は「カロライン號」の破壞は公的行爲で國王の爲に職を奉ずる者が上官の命令を受けて行つたものである。而してその責任はもしありまするならば、國王の政府に在り、諸國家の慣例從えば之に一關係した一個人に對して法的處置をとる論據とはなり得ない。個人はその政府によつて任命された當局者の命令に從はねばならない。と言ふのであつた。之に對して合衆國側は「事件は旣に法廷に移されてしまつてゐるので政府としてはマクレオドを直ちに釋放するわけには行かない。而して政府としての行動はマクレオドが法廷に於て釋放されるように有らゆる方法を講じ得る以外に何も出來ないこと、マクレオドに對して不當の判決があつた場合かゝる判決によつて處判されぬようにするより他はない。」と回答をした。然し乍ら英國側は萬一マクレオドに有罪の判決が下つて處形されるようなことがあれば宣戰布告が行はるものと諒解せしめた。（ヌ）人身保護命令がマクレオドに適用された。然しニューヨ

ーク州は彼の釋放を拒絶したが結局マクレオドは被告月未決監にあつた後法に公判を受けて無罪の判決を受けたのであつた。この際往復信書中合衆國國務長官ウエブスター氏は「合衆國政府は「公の敵」の一部を構成しその政府の命によつて行動する個人が私的の侵害或は犯罪人として責任を問はるべきではないと言ふことは公法上の原則であつて總ての文明國の慣例によつて認められたものであることを論駁しようとは思わない。」と言つてゐる。それで「英國政府によつて公的のこととして取扱う旨の承認があつた後はその命令を受けた者にはもはや責任はあり得ない。」と認めたのである。マクレオドが釋放された爲にこの州法廷の訴手續に抗辯することは出來なくなつたが、將來同樣の事件が起るのを避ける爲に一八四二年國會の法律が通過した。これは、聯邦裁判に對して外國の臣民又は市民で合衆國に任ずる者が國際法上合法且有法なる(一)外國の訓令又は命令によるか能或は保護の下に行つた或は犯した行爲の爲に拘禁された場合は常に人身保護令を認める權限を事實上附與したものであつた。

一八五七年不當なる逮捕並に拘禁に對する損害賠償の申請が一八五三年の條約によつて任命された損害賠償委員會に提出されたかこの申請は裁定者によつて棄却されたのである(四)

一國の代表者が自國の權限に基いて爲した行爲に關して他國の法律の適用を受けないといふ事は一般に認められた規則である。事實この規則は國家自體の行爲はその主權に基く限り他國の法廷で問題にされぬといふ廣範圍の原理の一部門にすぎぬように思われる。その理由は國家自體の行爲が外國の法廷の管轄を免除されるとすれば當然國家の代表者の行爲はそれが國家の權限に基いてなされ且それが委任された權限内にあるか國家がそれを採擇した場合、これ又免除を受けなければならぬ道理である からである。そしてこの規則は正當なる國家並びに事實上の政府の權限に基いて行はれた行爲にも適用される（N参照）

この原則の最も明瞭なる適用は一國の軍隊に關を置く者は戰時法の適用は受けるが交戰力を正當に行使した行爲に關して他國の民法の適用を受けないといふ事實が一般に認められている點にある

マックレオド事件において英國政府はこの原則を平時において名義上の友好國の臣民に對して國家の權限に基いて行われ且國家がその全責任を負つた行爲に準適當に擴大した。かくてこの問題は國家間の問題となつた。この特殊の場合英國は問題の行爲を自衛に迫られたものと辯解し得た。併しこれが假令辯解し得なかつたにせよその行爲が國家權限に基い

て行われたといふ事實は勿論賠償を求められたにしてもその代表者を譲るに十分であつたであろう。そしてこの同じ原則は交戰的行爲に對してでなく國の公の代表者がその公の資格において且その委任された權限内でなした行爲に對して適用される

そこでハッチ對ベーズ事件（七八二五九六）においてニューヨーク州法廷はドミニク共和國の前大統領がその公の資格においてなした行爲に對して訴訟を提起するを得ずと主張した

又アンダーヒル對ハーナンデッズ事件（二六米國（Δpp五七三）においてベネズエラ革命運動指導者の一人であり一時同國の革命政府の文武長官であつた被告が合衆國の一市民たる原告に對して加えた種々の侵犯行爲に關して合衆國においては訴訟を提起することを得ずと主張されたその理由はかかる行爲は一國の行爲として行われたものであつたからである

代表者の行爲を明瞭に採擇するのを必要とする事情が存在せぬ限り一國の默從はその行爲を外國人に對する國家の行爲として有效たらしめるに充分

であろう（O参照）一方、一國はその國のために行つたと稱する代表者の行爲を選擇する自由を有するさ同様に國家の命令によるかその代表者に委任された權限内において實際に行われなかつた行爲を非認する自由を有する。併し權限侵犯の理由で他國又はその臣民に何等かの損害を與えた場合にはかかる非認權は能うる限りその損害を賠償し侵犯者を罰する義務を國家に與えることになろう。更にこの種の事件において加害者を放棄することによつて訴訟された行爲に關して國家が責任を負うように思われる。（P参照）

代表者が自己の權限を越えて條約又は國際協定を結んだ場合にも非認權が存在する。併しこれにもそれに基いて獲得されたかも知れなかつた利益快復するさいう義務を與えるものである（Q参照）

(K)當時外務大臣であつた。ボルマーストン卿はロンドン駐在米國公使スチブンソン氏に斯くあるべきであるこ告げた

(L)ホール三七〇、三一四及テイラー一七一頁とも参照すべし

(M)ムーア仲裁判第三巻二四一九頁

(N)アンダーヒル對ハナンデス（二六米國App五七三）及スコット六二頁の揭載事項を参照すべし

(O) ロラ（六ＣＲＤＢ三六四）

(p) コーツウオース及ボーウエル審判（ムーア仲裁審判第二巻二〇五〇、二〇八五）を参照すべし

(Q) ホール三、三五及エルアリスチ約定五九三に付き参照但し條約締結國に依り直接結ばれるものを除いてはすべて批准さるべきものと現在思考されてある